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CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1936.

No. 743

A. A. LEWIS AND COMPANY, MAIN AND LINCOLN AVENUE SUBDIVISION, TRUST No. 1923, CENTRAL REPUBLIC BANK AND TRUST COMPANY, as Successor Trustee by consolidation,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

FRANZ W. CASTLE,
Attorney for Petitioners.

EMMETT J. McCARTHY,
HOWARD R. BRINTLINGER,
ROBERT F. CAREY,
Of Counsel.

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, A. A. LEWIS AND COMPANY, MAIN AND LINCOLN AVENUE SUBDIVISION, TRUST NO. 1523, CENTRAL REPUBLIC BANK AND TRUST COMPANY, as Successor Trustee by consolidation, respectfully pray that a writ of certiorari issue to review the judgment and decree of the United States Circuit Court of Appeals for the Seventh Circuit, entered in the above cause on the 18th day of November, 1936. (Record 53, not reported.)

I.

Summary statement of the matters involved.

The Commissioner of Internal Revenue, on January 3, 1934, levied a deficiency assessment against the petitioners in the amount of Five Hundred Twelve and 30/100 Dollars ($512.30) for income tax for the year 1931. These petitioners filed their petition in the United States Board of Tax Appeals on March 5, 1934, praying that the said deficiency assessment be rescinded.

On June 14, 1935, the United States Board of Tax Appeals filed a memorandum opinion (Record 36), and on July 13, 1935 entered a finding and judgment that there was no deficiency for the year 1931. (Record 39.)

The Commissioner of Internal Revenue, on October 14, 1936, filed a petition in the Circuit Court of Appeals for the Seventh Circuit, praying for a review of the decision of the Board of Tax Appeals and a reversal thereof.

Upon the 18th day of November, 1936, the Circuit Court of Appeals for the Seventh Circuit, entered an order reversing and remanding the cause to the Board of Tax Appeals, but without handing down any written opinion. (Record 53.)

II.

The facts.

On December 12, 1925, MINERVA S. MELIDONES, hereinafter called "Grantor", entered into two agreements respecting certain real estate owned by her in the Village of Niles Center, Cook County, Illinois. One of the agree-

ments, designated "Declaration of Trust", provided for the placing of title in the Chicago Trust Company of Chicago, (predecessor of Central Republic Trust Company) as Trustee, for the "ultimate use and benefit of" the grantor, and A. A. Lewis, as their interest should appear from the agreement attached to said declaration of trust. The trust so created was known as Trust No. 1523.

The trust agreement provided that while the Trustee had full power to deal with the real estate so far as the public was concerned, it was agreed by the parties that it would do so only in accordance with the provisions of the said agreement attached thereto.

The said agreement so attached to the trust agreement, was of even date therewith, and also executed by the Grantor and by the said A. A. Lewis, and the said Trustee. Lewis was an experienced real estate man, who specialized in the subdivision of land in the vicinity of Niles Center, Illinois. Under the agreement, Lewis was appointed exclusive selling agent of the land which should be subdivided in lots, the Grantor, however, reserving the right to withdraw any of the property from the operation of the trust agreement after nine months from the date thereof. The Grantor appointed Lewis "Manager of the Trust." The Grantor delegated Lewis "such power and duties in connection with the administration of the trust as may be necessary to facilitate the sale of the land." He was also given exclusive possession of the property during the continuance of the trust and was given power to give directions to the Trustee for the conveyance of any lot sold and paid for.

Among the powers specifically delegated to Lewis were the following: To exercise management and control of

the trust property for the purpose of selling it; to employ at his own expense a sales organization; to select and approve purchasers for the lots, both as to character and financial responsibility, and to request the Trustee to execute deeds and other instruments. Lewis agreed, at his own expense, to advertise the property for sale. As sole compensation for his services, Lewis was to receive a specified cash commission, based upon the price of lots sold.

The initial payment on each contract up to the amount of Lewis' commission, was to be retained by him. All subsequent payments were to be collected by the Trustee, who was to receive 3½% of collections made by it. All costs of surveying and subdivision fees and collection, expense of putting the real estate in shape for sale and of laying down of cement sidewalks, were to be borne by the grantor. All other expenses of sale, including compensation of salesmen, were to be paid by said Lewis out of the agreed commission.

The duties of the Trustee, as specified in the Declaration of Trust and attached agreement, were as follows: To hold title to the real estate; to issue certificates of beneficial interest; to deal with said real estate on written direction of the Grantor, and, under certain circumstances, of the said Lewis, to execute contracts to purchasers when directed so to do by said Lewis; to consent to assignments of contracts at the direction of said Lewis; to collect payments on contracts subsequent to the down-payment and to disburse all money received under the provision of the agreement; to keep books of account and to retain compensation from the amounts collected.

The Central Republic Trust Company afterwards be-

came Successor in Trust through the consolidation of the Chicago Trust Company with it.

The said Minerva S. Melidones was the owner of the property at the time of the formation of the trust. Her interest was thereafter assigned to Benjamin Swartz, and his estate is the sole beneficiary. No other persons than the above were at any time beneficiaries in the trust.

STATUTES INVOLVED.

III.

The Revenue Act of 1928, c. 852, 45 Stat. 791, provides in part as follows:

SEC. 701. DEFINITIONS.

(a) When used in this Act—

• • • • •

(2) The term "corporation" includes associations, joint-stock companies, and insurance companies. (U. S. C. A., Title 26, Sec. 1696.)

IV.

Decisions of the United States Board of Tax Appeals and Circuit Court of Appeals of the Seventh Circuit.

The United States Board of Tax Appeals found that there was no deficiency in income tax for the year 1931, the year for which a deficiency assessment was levied by the Commissioner of Internal Revenue. (Record 38.)

The Circuit Court of Appeals of the Seventh Circuit entered an order at the closing of the oral argument, reversing the decision of the Board of Tax Appeals

(Record 52) stating verbally from the bench, that in the opinion of the Court, the decision of the case was controlled by the decision of the Supreme Court of the United States in the case of *Morrissey* v. *Commissioner*, 296 U. S. 344.

V.

Question presented.

Whether the trust in question is an "association" within the meaning of Sec. 701 (a) (2) of the Revenue Act of 1928 and is hence taxable as a corporation.

VI.

Reason relied on for allowance of writ.

Petitioners believe that the writ of certiorari should be granted because:

(1) The case presents the following questions of law which have not been previously passed on by this Court:

(a) Whether a trust in which the beneficiary is not immune from liability can be considered an "association".

(b) Whether a trust in which there is no trustee or committee having powers of doing business analagous to a board of directors of a corporation can be considered an "association".

(c) Whether a trust in which there is a single beneficiary can be considered an "association".

(b) Whether a trust which is not of the business or Massachusetts type can be considered an "association".

(2) The trust involved in this case is representative of a large number of trusts which are not of the business or Massachusetts type, and the decision of this case will obviate much future litigation.

Wherefore, it is respectfully prayed that this petition for writ of certiorari be granted.

.....

FRANZ W. CASTLE,
Attorney for Petitioners.

EMMETT J. MCCARTHY,
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ROBERT F. CAREY,
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Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF IN SUPPORT OF PETITION.

I.

Opinions of courts below.

The findings of fact, conclusions of law and judgment of the United States Board of Tax Appeals are set out in the Record at pages 36, 37 and 38 and are not reported.

The opinion of the Circuit Court of Appeals of the Seventh Circuit is found in the Record on page 53 and is not reported.

II.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered November 18, 1936. (Record 53.)

The jurisdiction of this Court is invoked to review the cause by writ of certiorari under Section 240 (a) of the Judicial Code (U. S. C. A., Title 28, Chapter 9, Sec. 347), providing for the granting of a writ of certiorari by this Court to review a final judgment or decree of a Circuit Court of Appeals of the United States.

III.

Statement of the case.

A statement of the case is set out in the foregoing petition under caption "Summary Statement of Matters Involved" and the "Facts" to which references are hereby made.

IV.

Specifications of errors.

The Circuit Court of Appeals of the Seventh Circuit erred in reversing the decision of the United States Board of Tax Appeals.

V.

Argument.

The congress saw fit to provide in the Revenue Act that "associations" should be taxed as corporations without defining the exact meaning of the word "associa-

tions". Much confusion has arisen in adjudicated cases arising under the Act, although the decision by this Court of the case of *Morrissey* v. *Commissioner,* 296 U. S. 344, and of the other three cases decided at the same time has done much to clarify the situation. However, in all of the cases which have been before this Court for decision, the trusts involved have been of the business or Massachusetts type, which type has been carefully developed to possess and exercise all the advantages of the corporate form of organization, and to avoid all the burdens incidental thereto. It seems fair to assume that it was the purpose of Congress to compel such organizations to assume responsibilities which are commensurate with the advantages and immunities secured by them by aping the corporate form of organization.

This Court, therefore, has not had an opportunity to lay down authoritatively the line of distinction which seemed to be suggested in the opinion of Chief Justice Hughes in the *Morrissey case, supra,* where, on page 360 of the opinion, the following statement appears:

> "• • • trusts that thus satisfy the primary conception of associations and have the attributes to which we have referred *distinguishing them from partnerships.*" (Italics ours.)

From the above language, and also from the statement of salient features of trusts which are to be considered associations contained in the paragraph of said opinion immediately preceding the one from which the above exerpt is quoted, the petitioners have concluded that a trust in which the beneficiaries remain personally liable as individuals or as partners, is not to be considered an association.

In the instant case, Minerva S. Melidones, the original

owner of the real estate in question, continued to be liable for any action of her agent, Albert A. Lewis, in connection with the subdivision and sale of the real estate. The attention of the Court is directed to the language of the sales agreement. In the inducement (Record 19), the following language appears:

> "And, Whereas, the said party of the first part (Melidones) is desirous of securing the services of the party of the second part (Lewis) in selling the lots in said subdivision. * * *" (Parentheses ours.)

And gain in Article I (Record 20):

> "The party of the first part does hereby constitute the party of the second part * * * exclusive sales agent of said property."

This brings us to the consideration of the real nature of the arrangement effected by the documents executed by the three interested parties, to-wit, the owner, the sales agent and the trustee. (Record 13 to 26.) Stripped of all non-essentials, the facts emerge as follows: A woman owned real estate; she employed an experienced subdivider to subdivide and to sell it, agreeing to pay a fixed commission on the lots sold out of which the subdivider was to pay all advertising and sales costs. Simultaneously with the execution of the sales agreement, she put the title in trust under standard printed form of land title trust, under the terms of which the trustee agreed to hold the title subject to the order of the owner and sales agent. The Trustee was given no discretionary powers whatever and no attempt was made to secure to the sole beneficiary immunity from liability.

It seems to the petitioners that the arrangement thus effected lacks at least four of the essentials of "associations" as stated in the *Morrissey* case in the following language:

First: "The designation of trustees, who are charged with the conduct of an enterprise—who act 'in much the same manner as directors.'" (p. 359.)

Second: "The trust method also permits the limitation of the personal liability of participants embarked in the undertaking." (p. 359.)

Third: "'Association' implied associates." (p. 356.)

It seems clear that the trust was merely a security device whereby the title was protected from the vicissitudes from which it would have been subject, had it remained in the original owner. Purchasers of lots on deferred payments may not have been able to obtain title, had it not been put in a neutral third party. In other words, the trust was merely an incidental feature of the plan. This trust is representative of a large number of trusts which are not trusts of the Massachusetts type but are incidental to business enterprises.

The Treasury Regulations applicable to the subject matter are conflicting, as set forth in the *Morrissey* case. (p. 356.) The Commissioner of Internal Revenue seems to consider that if a trust is in any way connected with a business enterprise, an association *ipso facto* results. In the present state of the law, the Trustees and beneficiaries in such trusts are uncertain as to their status and much confusion has resulted and much litigation will result unless the distinction suggested in the *Morrissey* case is translated into authoritative language of the court. The attorneys whose names are subscribed to this petition have two similar cases now pending in the Circuit Court of Appeals of the Seventh Circuit.

The Circuit Court of Appeals did not render any opinion, but at the closing of the oral argument entered an order reversing the judgment of the United States Board

of Tax Appeals. The Chief Justice, in behalf of the Court, stated orally from the bench, that in the judgment of the Court the decision of the Supreme Court of the United States in the *Morrissey case, supra,* was conclusive and necessitated the reversal of the judgment.

CONCLUSION.

It is believed that the foregoing discussion and citation of authorities demonstrates that the decision of the Circuit Court of Appeals is erroneous. It is earnestly urged in the interest of further clarification and settlement of the law upon the issues involved that this Honorable Court entertain a review of this case on writ of certiorari, and it is respectfully submitted, in the light of the reasons indicated, that the petition should be granted.

FRANZ W. CASTLE,
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